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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

RAINBOW BROADCASTING COMPANY

For Extension of Construction Permit
and for Consent to the Transfer of
Control of the Permittee of
Station WRBW(TV), Orlando, Florida

TO: Roy J. Stewart, Chief
Mass Media Bureau

File Nos. BMPCT-910625KP
and BTCCT-911129KT

95-172

DWRBW (60)

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OPPOSITION OF PRESS BROADCASTING COMPANY, INC.
TO "PETITION FOR RECONSIDERATION AND GRANT OF APPLICATION
FOR ASSIGNMENT OF CONSTRUCTION PERMIT"

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July 12, 1993

SUMMARY

The denial of the application for extension of the construction permit of Station WRBW(TV) was completely consistent with the Commission's rules, policies and precedent. An applicant for extension of a permit must demonstrate either that it has completed construction, or that it has made substantial progress toward completion, or that it has been prevented from making such progress by circumstances beyond the permittee's control. Here, Rainbow Broadcasting Company ("Rainbow"), the permittee, had not completed construction or made any progress toward completion. To the extent that it relied on a single circumstance which allegedly prevented it from constructing, the available evidence is absolutely clear that that circumstance did not prevent Rainbow in the least from constructing. Rather, as the Video Services Division correctly found, Rainbow's failure to construct was a purely voluntary business decision on Rainbow's part. As a result, no extension was warranted.

The additional factual and legal claims which Rainbow advances in its Petition for Reconsideration can and should be summarily dismissed, as they all could have been advanced long ago, and Rainbow has offered no explanation as to why it chose not to present those arguments before its permit was cancelled.

But even if the Commission were to consider Rainbow's post-cancellation arguments, those arguments all tend to support the denial of Rainbow's extension application and the cancellation of its permit.

And even if the Commission were inclined to ignore the overwhelming weight of its rules, policies and precedent, the factual record here would not permit any grant of authority to Rainbow unless and until a full evidentiary hearing were held with respect to Rainbow's apparent lack of truthfulness and candor, its apparent lack of financial qualifications, its apparent willingness to

abuse the Commission's processes. Indeed, in view of Rainbow's sorry record, it would be appropriate to assess Rainbow a substantial fine for its misconduct to date.

However, no hearing (and no fine) is necessary to resolve the matter presently before the Commission. For that purpose, it will suffice simply to affirm the denial of Rainbow's extension application and the cancellation of its permit.

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ATTACHMENTS

- Attachment A Letter (Ref. 18000E1-PRG), dated June 18, 1993 from Barbara Kreisman,
Chief, Video Services Division, to Counsel for Rainbow and Press
- Attachment B Application (File No. BPCT-880711KE) for Extension/Reinstatement of
Construction Permit (filed July 11, 1988)

ATTACHMENTS (*con't*)

- Attachment C** Application (File No. BPCT-890510KG) for Reinstatement of Construction Permit (filed May 10, 1989)
- Attachment D** Application (File No. BMPCT-891117KE) for Extension of Construction Permit (filed November 17, 1989)
- Attachment E** Application (File No. BPCT-900702KK) for Reinstatement of Construction Permit (filed July 2, 1990)
- Attachment F** Application (File No. BMPCT-9101225KE) for Extension of Construction Permit (filed January 25, 1991)
- Attachment G** Application (File No. BMPCT-910625KP) for Extension of Construction Permit (filed June 25, 1991)
- Attachment H** Excerpt from deposition of Joseph Rey
- Attachment I** Declaration of Robert McAllan
- Attachment J** Complaint filed by Plaintiffs in *Joseph Rey et al. v. Guy Gannet Publishing Co. et al.* (Exhibits omitted)

1. Press Broadcasting Company, Inc. ("Press"), licensee of Station WKCF(TV), Clermont, Florida, hereby opposes the "Petition for Reconsideration and Grant of Application for Assignment of Construction Permit" ("Petition") submitted by Rainbow Broadcasting Company ("Rainbow") in connection with the above-captioned applications. Rainbow seeks reconsideration of the letter (Ref. 1800E1-PRG), dated June 18, 1993, to Rainbow and Press from Barbara Kreisman, Chief, Video Services Division. A copy of that letter is included as Attachment A hereto for the convenience of the Commission.

2. In her letter, Ms. Kreisman denied Rainbow's application for extension of its construction permit for Station WRBW(TV), Orlando, Florida, cancelled both the construction permit and the call sign of that station, and dismissed Rainbow's application for authority to assign the permit. As set forth in detail below, Ms. Kreisman's actions were completely consistent with well-established Commission policies and precedent and her actions enjoyed substantial factual support. Accordingly, Rainbow's Petition should be denied and Ms. Kreisman's actions should be affirmed.

STANDING

3. Station WKCF(TV) serves the general area of the Orlando ADI, including Clermont (the station's community of license) and other communities in the market. Further, pursuant to Commission approval, Station WKCF(TV)'s antenna is located on the same tower specified in Rainbow's now-cancelled construction permit. As a result, it is beyond argument that Press would compete against Rainbow for audience and revenues (if Rainbow were ever to construct and operate its station), and therefore Press has standing to object to Rainbow's Petition. *See, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

FACTUAL AND PROCEDURAL BACKGROUND

4. Because Rainbow's description of the history of this case is less than a model of clarity and accuracy, Press offers the following chronology of relevant events. Rainbow's permit was initially granted in 1984. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (Rev. Bd. 1984). Although fully authorized to construct and operate, Rainbow declined to construct its station until its grant had become final at the conclusion of all judicial appeals. To that end, it filed no fewer than four applications for extension or reinstatement of its permit during the course of appellate litigation concerning its permit. See File Nos. BPCT-880711KE, BPCT-890510KG, BMPCT-891117KE, BPCT-900702KK (Copies of Rainbow's first four extension/reinstatement applications are included as Attachments B, C, D and E hereto for the Commission's ease of reference). In those applications, the sole basis stated for Rainbow's failure to construct was the fact that its grant was still subject to judicial review. *Id.* In each of those applications, Rainbow specifically stated that all other representations set out in its original construction permit application remained accurate. *Id.* (see responses to Paragraph 8 in each of Rainbow's extension applications).

5. On August 30, 1990, Rainbow's grant became final. See Rainbow Petition at Appendix A, page 2 ("08.30.90 Supreme Court denies request for rehearing GRANT NOW FINAL"). Thus, the justification which Rainbow had relied upon up to that point for non-construction -- *i.e.*, the supposed uncertainty of the appellate process -- immediately lost any validity it might have had previously.

6. On January 25, 1991, Rainbow filed its fifth extension/reinstatement application. See Attachment F hereto. In that application Rainbow again referred to the fact that the appeals of its grant had not been completed until late 1990. Apparently recognizing that the "on-going appeals" excuse had, since August 30, 1990, lost any merit it might ever have had and that some other excuse for non-construction would have to be advanced, Rainbow then stated as follows:

Upon [completion of all appeals], Rainbow engaged engineering services to

undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner* which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS). A Motion for Preliminary Injunction was heard on January 11, 14 and 16, 1991 and is scheduled to conclude on January 23, 1991, with a decision anticipated shortly thereafter.

Rainbow anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. *Rainbow is ready, willing and able to proceed with construction upon a ruling from the District Court* and anticipates completion of construction within 24 months of a favorable Court action.

See Attachment F hereto (emphasis added).

7. Rainbow's January, 1991 extension application was granted almost immediately, with the new expiration date set at August 5, 1991. On June 25, Rainbow filed a sixth extension application. There, after again repeating its boilerplate remarks concerning the length of the appellate process, Rainbow stated:

Upon [completion of all appeals], Rainbow engaged engineering services to undertake construction of the station. *Actual construction has been delayed by a dispute with the tower owner* which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS). A motion for preliminary injunction was denied by the court on June 6, 1991.

Immediately upon denial of the preliminary injunction request, Rainbow notified the tower owner of its intention to commence construction (a copy of the letter to Guy Gannet Tower Co. is appended hereto) and requested that the lease provisions regarding construction bids be effectuated. In addition, Rainbow has initiated discussions with equipment manufacturers regarding construction specifications and intends to place its equipment order as soon as the building construction schedule is finalized.

Rainbow will commence operation prior to December 31, 1992, as it previously informed the Commission.

See Attachment G hereto (emphasis added).

8. Thus, in its fifth and sixth extension applications, Rainbow sought extensions solely on the basis of its claim that a "dispute" with its tower owner had somehow prevented

construction.^{1/} Further, Rainbow explicitly and expressly stated in its sixth application (filed on June 25, 1991) that it was at that time going forward with construction, that it would place equipment orders in the near future, and that, *without condition or caveat*, it would begin operation "prior to December 31, 1992".^{2/}

9. As noted above, Rainbow's January, 1991 application was granted quickly -- so quickly that Press was unable to file an informal objection before the grant. Press did file a timely petition for reconsideration of the grant, however. In that petition Press pointed out that the "dispute" with the tower owner cited in Rainbow's application was not in any way, shape or form a bar to Rainbow's construction. To the contrary, it was a lawsuit *initiated by Rainbow* and designed solely to prevent Rainbow's tower owner from leasing certain tower space to Press. Far from relying on some notion that the tower owner was preventing Rainbow from constructing, Rainbow's allegations demonstrated that there was absolutely no impediment to Rainbow's construction whatsoever. Press even quoted the sworn testimony of Rainbow's dominant principal, Joseph Rey, in which Mr. Rey explicitly and expressly admitted that Rainbow could construct its facility at any time:

Q: Is it your understanding as you sit there right now, if you want to put the antenna up top, that you could put it up at that height on the tower?

Rey: I could put it up at that height, but I have to share it, is what they are telling me.

Rey Dep. Tr. 130 (Attachment H hereto). Press also pointed out a variety of other sworn statements made by Mr. Rey or other Rainbow representatives, all of which raised serious questions concerning Rainbow's financial qualifications and its truthfulness and candor before the Commission.

^{1/} It should also be noted that, in both the fifth and sixth extension applications, Rainbow again stated that all representations set forth in its original construction permit application remained true and correct. See Attachments F and G hereto.

^{2/} Although Rainbow's permit was then set to expire in *August, 1991*, Rainbow specified *December 31, 1992* - more than 16 months *after* the expiration date which had been extended five times already -- as the approximate date of commencement of operation. While Rainbow has argued that it should be entitled to a full two years following finality of the appellate process, even that measure (which is not supported by rule or precedent) would have required completion of construction by August 30, 1992.

10. In its opposition to Press' petition for reconsideration, Rainbow declined to explain how it had been precluded in any way from constructing its station up to that point by the "dispute" with its tower owner.^{3/} Instead, Rainbow attempted to deflect the force of the factual evidence against it by casting various aspersions on Press. While Rainbow continued to assert that its failure to construct was attributable to circumstances "clearly beyond its control", Rainbow Opposition (filed March 12, 1991) at 6, it never even attempted to explain what those circumstances might have been.

11. On June 6, 1991, the Judge in the lawsuit between Rainbow and its tower owner denied Rainbow's request for a preliminary injunction. In so doing, he reached a number of findings and conclusions which corroborated Press' charges against Rainbow. Despite the fact that Rainbow had relied centrally on the pendency of its lawsuit as a justification for its failure to construct, Rainbow did not promptly notify the Commission of the Judge's decision or provide a copy of that decision; rather, it was Press which first brought that development to the Commission's attention.

12. Press also filed an informal objection to Rainbow's sixth (June, 1991) extension application. In that objection Press again pointed out Rainbow's repeated failure to satisfy the requirements of Section 73.3534 of the Commission's rules. Additionally, Press incorporated by reference the arguments which it had previously advanced in its petition for reconsideration of the January, 1991 application (which had not theretofore been acted on).

13. In November, 1991, Rainbow supplemented its sixth extension application by advising the Commission that the transmitter building had been completed at a cost of approximately \$60,000. At the same time, Rainbow filed an application (FCC Form 316) for assignment of

^{3/} Indeed, in its opposition Rainbow, perhaps unwittingly, further undermined its own case. There Rainbow acknowledged that it had initiated the lawsuit (*i.e.*, the "dispute") against its tower owner on *November 2, 1990*. But Rainbow also included, as an attachment to its opposition, a memo dated *November 5, 1990* -- three days *after* the lawsuit was filed -- in which Rainbow advised the tower owner that Rainbow intended to go forward at that time with construction. In other words, Rainbow plainly recognized, from the very beginning of its "dispute" with the tower owner, that that "dispute" did not affect Rainbow's ability to construct. Of course, in its fifth and sixth extension applications, Rainbow told the Commission a very different story.

Rainbow's permit to a new entity which would supposedly be controlled by Rainbow's already-approved principals. According to Exhibit 1 to that application, the application proposed

a reorganization which will permit [Rainbow] to reduce its reliance on debt to complete construction and commence operation of a new UHF television station on Channel 65, Orlando, Florida by December 1992, by restructuring to admit nonvoting equity participants.

See BTCCT-911129KT, Exhibit 1. The assignment application made no other reference to construction of the station, and did not suggest (much less specifically represent) that Rainbow's ability to construct was contingent on favorable action on the proposed assignment.

14. Press objected to the assignment application, pointing out that the proposed assignment tended to confirm virtually all of the allegations which Press had advanced in its earlier pleadings. Rainbow opposed Press' objection, again without addressing the mounting body of factual evidence presented by Press.

15. And there matters stood for approximately 18 months. In March, 1993, the Commission wrote to Rainbow asking for a detailed report on Rainbow's efforts, since November, 1991, to construct the station. In April, 1993, Rainbow submitted its response which indicated, in effect, that Rainbow had done *NOTHING* in the intervening 18 months.^{4/} Press submitted comments on Rainbow's response, pointing out that that response further demonstrated Rainbow's failure to comply with Section 73.3534 of the Rules, and also that that response tended to substantiate most (if not all) of Press' other allegations concerning Rainbow's lack of financial qualifications, lack of truthfulness and candor, abuse of process, and the like.

16. On June 18, 1993, Ms. Kreisman issued her letter effectively granting Press' objection to Rainbow's June, 1991 extension application.

^{4/} According to Rainbow's April, 1993 version of its story, it had been unable to proceed with construction without approval of its assignment application.

ARGUMENT

17. In its Petition Rainbow confusingly warps a variety of facts and arguments in an apparent effort to generate some sympathy and credibility for its position. That effort, however, is unavailing. Ms. Kreisman's action was completely supported both by the facts which were before her and by relevant Commission policies and precedent. To the extent that Rainbow now attempts to rely on information or arguments which were not previously presented to Ms. Kreisman and which, therefore, could not have been considered in her decision, Rainbow is still barking up the wrong tree: Rainbow's various bogus claims do not, and cannot, hide the undeniable shortcomings of its position; indeed, in many respects Rainbow's newly-minted claims underscore those shortcomings. The following discussion is organized to address, first, the clear correctness of Ms. Kreisman's decision, and second, the equally clear inadequacy of Rainbow's post-decision claims.

I. Ms. Kreisman's Analysis of the Factual and Legal Issues Presented by Rainbow's June, 1991 Extension Application Was Clearly Correct.

18. Applications for extension of construction permits are governed by Section 73.3534 of the Commission's Rules. That section requires an applicant for extension to demonstrate either that (a) construction is complete or (b) substantial progress has been made (equipment is on order or on hand, site is acquired and cleared, construction is proceeding toward completion) or (c) no progress has been made due to circumstances clearly beyond the permittee's control. To the extent that progress toward construction is to be considered, the Commission will consider only the permittee's actions during the most recent extension period. *E.g., Metrovision, Inc.*, 3 FCC Rcd 598 (Video Services Division 1988). That is, the Commission expects construction efforts to be diligent and on-going, and a permittee is not allowed to begin some preliminary construction-related projects early on in the process and then simply to sit back and obtain extensions *ad infinitum* on the basis of those initial efforts.

19. In this case the relevant extension period began in February, 1991, with the grant of Rainbow's January, 1991 extension application.^{5/} The only available information concerning Rainbow's construction efforts subsequent to January, 1991 was submitted by Rainbow in its June, 1991 application.

20. Let's look at what Rainbow advised the Commission, in that application, concerning its construction efforts during the relevant period. Needless to say, Rainbow could not -- and did not -- claim that construction had been completed. Similarly, Rainbow could not -- and did not -- point to any substantial construction. The only "progress" it reported was that it had notified the tower owner of its intention to proceed with construction, that it had "initiated discussions with equipment manufacturers" and that it "intend[ed] to place its equipment order as soon as the building construction schedule is finalized." See Attachment G hereto.^{6/} This cannot be seen as substantial progress by any means, since it reflects, in effect, no progress at all. In view of the fact that Rainbow had already enjoyed four extra months (following grant of its January, 1991 extension application), not to mention the extra five months between August 30, 1990 and February, 1991, and not to mention the four previous extensions which Rainbow had enjoyed, the Commission properly

^{5/} In fact, it would probably be more accurate to state that the relevant period commenced on August 31, 1990. Up to that point Rainbow had asserted that its failure to construct was attributable to the lack of judicial finality of the grant of its permit. Such finality was obtained on August 30, 1990. Thus, Rainbow could and should have commenced construction efforts immediately as of that date. To the extent that Ms. Kreisman's letter overlooks this fact and considers only the period commencing in February, 1991, she has effectively accorded Rainbow a five-month grace period of sorts.

^{6/} In November, 1991, five months after the June, 1991 application, Rainbow supplemented that application to indicate that the transmitter building had been constructed. However, as Press has previously advised the Commission, that building was actually built to accommodate Press' co-located transmitter as well as Rainbow's. Since Press (unlike Rainbow) constructed its authorized facilities at that site, Press had to make arrangements for a transmitter building. Accordingly, in cooperation with the tower owner, Press caused the transmitter building to be built on a schedule which would permit Press to complete installation and commence operation within approximately four months of Judge Marcus' decision. (And the Commission's records will reflect that Press did in fact meet that schedule, commencing operation from that site in the first week of October, 1991.) The transmitter building was designed with sufficient space for both Press' and Rainbow's transmitters. However, that portion of the space reserved for Rainbow is apparently still vacant and, as Rainbow itself admits in its Petition (at n. 10), Rainbow has not even bothered to install electrical power to its portion of the building yet.

expected Rainbow to have done more than send a memo to the tower owner and "initiate discussions with equipment manufacturers". ^{2/}

21. Since no substantial progress had been demonstrated, that left only the "circumstances beyond the permittee's control" element of Section 73.3534 for Rainbow to fall back on. In that regard Rainbow alleged in its application that "[a]ctual construction ha[d] been delayed by a dispute with the tower owner". See Attachment G hereto.

22. But, as Ms. Kreisman correctly points out, that was not a circumstance beyond Rainbow's control which prevented it from building. Indeed, in the lawsuit in question, Rainbow's own principal had testified that he knew he *COULD* construct at any time. That was further demonstrated by the November 5, 1990 memo from Rainbow to the tower owner, which Rainbow submitted to the Commission with its opposition to Press' February, 1991 petition for reconsideration. See Footnote ___, *supra*. And it was still further demonstrated by the fact that, when Rainbow's effort to obtain a preliminary injunction was denied in June, 1991, Rainbow announced that it intended to proceed immediately with construction, proving conclusively that Rainbow *knew* that the lack of a preliminary injunction was not a bar to construction. As a result, Rainbow could *not* legitimately claim that it had been prevented from constructing by circumstances *beyond* its control. To the contrary, the entire "dispute" relied upon by Rainbow was a matter which was *entirely WITHIN Rainbow's control*.

23. But that "dispute" was the *only* circumstance cited by Rainbow in its application. Because of that, Ms. Kreisman was absolutely correct in her finding that Rainbow had made a

^{2/} Refusal to credit the supposed "initiat[ion] [of] discussions with equipment manufacturers" is especially sound in view of Rainbow's admission, *nearly two years later*, that it *STILL* had not even selected, much less ordered, any equipment as April, 1993.

deliberate business judgment not to construct during the relevant extension term.^{8/} As a result of that finding, it was clear that Rainbow had failed to satisfy any of the three criteria set out in Section 73.3534, and Rainbow's application was properly denied.

II. Rainbow's Post-Decision Claims Do Not Warrant Reconsideration.

24. Perhaps recognizing that the record which was before Ms. Kreisman completely supports her decision, Rainbow devotes most of its Petition to various factual claims and legal arguments which were not presented previously. But these new-found facts and claims cannot properly be raised at this time, absent an explanation as to why they could not have been raised earlier. Section 1.106(c). Since Rainbow has not offered (and could not legitimately offer) any such explanation, the Commission can and should simply ignore them. But even if the Commission were to consider these claims and arguments, the correctness of Ms. Kresiman's decision would not be affected in the least.

25. "*Rainbow's effort and expenditure.*" Rainbow leads off its reconsideration argument with a claim that it has made "substantial effort and expenditure in furtherance of the construction" of the station. Petition at 4-5. Rainbow then provides a listing of alleged^{9/} expenses totalling slightly less than \$1,000,000. According to Rainbow, these expenditures "demonstrate the seriousness of Rainbow's commitment to constructing and operating the facility." Petition at 5. In

^{8/} That finding was also amply supported by the sworn statements of Rainbow and its representatives made in the lawsuit against the tower owner. For example, in its complaint in that lawsuit, Rainbow (over Mr. Rey's signature) stated that Rainbow "is now prepared . . . to commence construction However, [Rainbow's] permit for Channel 65 . . . is not a viable business opportunity if, in fact, [the tower owner] is permitted to place additional TV antennas" at the top of the tower. See Attachment J hereto at 10. The clear import of this (and the rest of Rainbow's suit) is that Rainbow *elected* not to construct in order to avoid a potentially undesirable competitive environment. But it is well-established that the avoidance of competition is not a valid justification for failure to construct. See, e.g., *New Orleans Channel 20, Inc.*, 100 FCC2d 1401 (Mass Media Bureau 1985), *application for review denied*, 104 FCC2d 304, 313 (1986), *aff'd sub nom. New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987); *Community Service Telecasters, Inc.*, 69 R.R.2d 1608 (1991); *Panavideo Broadcasting, Inc.*, 69 R.R.2d 1333 (1991).

^{9/} While Rainbow asserts that the listed expenses represent "actual out of pocket payments", Petition at n. 5, no independent documentation of such payments has been provided.

fact, just the opposite is true.

26. Of the total amount of expenditures, the vast majority -- more than \$800,000 -- is subsumed in two line items: "tower lease and related taxes/insurance 1986-present" and "professional fees (legal/accounting)". But, as the Commission is aware, Rainbow entered into its tower lease in 1985, and has been paying lease payments for some seven years already. Rainbow was under no obligation to bind itself to an actual lease before it commenced construction; rather, it voluntarily elected to do so even before its construction permit was final.^{10/} Since Rainbow has done absolutely nothing with the lease (other than to sue the landlord) during the seven years that the lease has been in existence, it is difficult to see how Rainbow's lease payments could be deemed "progress toward construction" in any meaningful sense. To the contrary, the lease underscores the complete *lack* of progress here: despite the availability of a transmitter site for more than seven years, Rainbow had *still* not even selected (much less ordered, obtained or installed) any equipment.

27. The same is true of "professional fees". Such fees do not normally reflect or affect progress in the actual construction of a station. This is especially true here, where Rainbow has not provided any itemization at all of the services which were provided for the fees which were allegedly paid. Press surmises that an itemization would likely have indicated that a significant portion of those fees were attributable to litigation wholly unrelated to any effort to construct the station. For example, we know that Rainbow has litigated for more than two years with its tower owner in an effort to keep Press from co-locating its antenna with Rainbow's. Such litigation does not advance Rainbow's construction in any way. But did the "professional fees" line item in Rainbow's Petition include such litigation costs? Rainbow hasn't bothered to say.

28. Similarly, as the Commission is aware, during the period 1988-1991 Rainbow

^{10/} Indeed, the fact that Rainbow was apparently willing to commit to spending hundreds of thousands of dollars in lease payments before the completion of judicial review of its permit seemingly contradicts Rainbow's repeated claims to the Commission that Rainbow was unwilling to put itself at risk pending the appellate process.

actively (and unsuccessfully) litigated in opposition to Press' proposal to exchange channels with a noncommercial educational station in Cocoa, Florida. See *Rainbow Broadcasting Company v. FCC*, ___ F.2d ___, 69 R.R.2d 1572 (D.C. Cir. 1991). Such litigation again could not advance in any sense the construction of Rainbow's own station, and legal fees paid in connection with that litigation cannot legitimately be considered here.

29. The more fundamental problem with Rainbow's "effort and expenditure" argument, though, is that it assumes that mere expenditure of funds is conclusive proof of progress toward construction. That clearly is not the case. As Section 73.3534 makes clear, an applicant for an extension must demonstrate **SUBSTANTIAL PROGRESS** toward completion of construction. While such "substantial progress" may often entail corresponding substantial expenses, it does not logically follow that expenses alone (substantial or otherwise) necessarily demonstrate "substantial progress". By way of illustration, if Rainbow had paid \$1,000,000 for the preparation of promotional frisbees featuring the station's call sign and channel number, that expense would plainly not reflect any "substantial progress" toward construction. The same would be true of legal fees paid for litigation unrelated to any effort actually to complete construction and commence operation. The same would be true of lease payments made over a period of seven years for a tower site which was never utilized in any way.

30. Thus, even if Rainbow's various alleged expenses were properly before the Commission, those expenses are ultimately immaterial here. While Rainbow claims that its expenses "demonstrate the seriousness of [its] commitment to constructing and operating", the simple fact is that Rainbow has not constructed and has not made any substantial progress to construct, despite the fact that Rainbow has held a construction permit for almost ten years, including nearly three years since the finality of all appeals. That wholesale failure is the clearest, most conclusive demonstration of Rainbow's *lack* of "seriousness".

31. Moreover, it would be unwise, as a policy matter, to accord Rainbow any credit

for its asserted expenses. Such an approach would encourage permittees to run up their supposed expenses for all manner of things *unrelated* to construction so that they could point with pride to those expenses as a justification for permit extensions. But, as discussed above, the Commission is interested in the *progress* of *construction*, not the mere spending of money. Since Rainbow's claimed expenses have plainly not resulted in *any* construction *progress*, they could not in any event properly be considered as justifying an extension.

32. *Tower Litigation.* At pages 6-7 of the Petition, Rainbow discusses its litigation with the tower owner. That discussion is, to say the least, bizarre. Recall that, in its January, 1991 and June, 1991 extension applications Rainbow had specifically stated that "actual construction has been delayed by a dispute with the tower owner". Recall also that that was the *sole* explanation offered by Rainbow for its failure to construct. Now, in its Petition, Rainbow states that

Rainbow's dispute with the tower owner did not materially delay construction. . . . To the extent that the tower litigation is relevant to this proceeding, it serves only to reflect the seriousness of Rainbow's efforts to construct the station as proposed.

Rainbow Petition at 6. This position appears to flatly contradict Rainbow's representations in its January, 1991 and June, 1991 applications. And the second quoted sentence is simply nonsense since -- as Press has previously demonstrated -- Rainbow was *at all times* in a position to "construct the station as proposed" *irrespective of the tower litigation*.

33. In a similar vein, Rainbow challenges as "misleading and inaccurate" the statement that

Rainbow did not construct because it chose not to go forward in order to avoid sharing tower space with Press. . .

Id. Of course, despite Rainbow's latest protestations, that particular claim is amply supported by the record of Rainbow's own statements in the lawsuit which Rainbow itself filed. And having challenged the quoted statement as "misleading and inaccurate", in its Petition Rainbow offers no proof of any sort to support its conclusory rebuttal. To the contrary, all that Rainbow has to say on

the subject is

[w]hile Rainbow believed its lease gave it exclusive use of the higher antenna aperture and had paid rent since 1986 to protect that higher antenna slot, Rainbow would have proceeded with construction during the tower litigation since Press would have been required to either move its antenna or protect Rainbow's operation [otherwise].

Petition at 7. But that doesn't make any sense, either, since we all know that Rainbow did *NOT* proceed with construction during the tower litigation. To the contrary, in its January, 1991 and June, 1991 applications Rainbow cited the pendency of that litigation as the cause of delay.

34. This portion of Rainbow's Petition, like many of its arguments in the past, runs afoul of (a) the facts, which are readily ascertainable, and (b) Rainbow's own previous statements to the Commission, which are equally ascertainable.

35. *Rainbow's Assignment Application.* Rainbow's final argument is that it was prevented from constructing by the Commission's failure to act on Rainbow's November, 1991 assignment application. As an initial matter, that assignment application was filed almost four months *after* the expiration of Rainbow's fifth extension term, and more than five months *after* Rainbow's June, 1991 extension application. Since, as noted above, the relevant focus for evaluating the June, 1991 extension application is Rainbow's progress from February through July, 1991, anything Rainbow might have done, or might have proposed to do, after that period -- say, at the end of November, 1991 -- is largely irrelevant here. This is especially true in view of Rainbow's unequivocal and unconditional statement in its June, 1991 application that Rainbow was at that time prepared to complete construction by December 31, 1992.

36. Nor can Rainbow assert that unforeseen circumstances arose between June, 1991 and November, 1991 which unexpectedly made grant of the assignment application absolutely essential to Rainbow's ability to construct. One can search in vain for any indication along those lines in the assignment application, which Rainbow took pains to depict as a simple, uncontroversial "reorganization which will permit [Rainbow] to reduce its reliance on debt". If Rainbow had really

thought that prompt grant of its assignment application was absolutely essential to its ability to construct, why did it not make *any* mention of that in the application or why did it not seek expedited consideration at any time?

37. Perhaps most telling of all is Rainbow's claim that the lack of a grant of the assignment application "left [Rainbow] unable to go forward". Petition at 7-10. But Rainbow never bothers to explain why it might have been "unable". This claimed "inability" is puzzling, since Rainbow has consistently represented to the Commission -- from its January, 1991 extension application even to its most recent July, 1993 Petition -- that Rainbow is "ready, willing and able" to construct. See Attachment F, Exhibit 1, hereto; see also Petition at 10. How, then, could Rainbow say at the same time that Rainbow is "unable to go forward"? Rainbow has declined to address this obvious contradiction in its position. ^{11/}

38. Press, of course, has suspected for more than two years that Rainbow does not have financing and that the various gyrations Rainbow has undertaken have been designed to finesse that pesky problem without advising the Commission. ^{12/} In Press' view, the assignment application

^{11/} Rainbow also suggests that Rainbow did not have "Commission permission" to "go forward" with construction. Petition at 10. But, until Ms. Kreisman's June 18, 1993 denial of Rainbow's June, 1991 extension application, that assertion was clearly wrong. Rainbow had a construction permit, and it had filed an application for extension of that construction permit. Pending action on that application, the permit remained valid and outstanding. Thus, no further Commission permission was required before Rainbow could proceed with construction, if Rainbow were in fact "ready, willing and able" to do so, as it had repeatedly held itself out to be.

^{12/} Press is not alone in this belief. Judge Marcus, who presided over Rainbow's lawsuit against the tower owner, concluded that

Rainbow has not arranged financing; a note for financing has not been completed. . . . [T]here is no convincing proof that Rainbow actually has financial backing The evidence illustrated that since 1982, Rainbow has yet to obtain financing

Rey et al. v. Gxy Gannet Publishing Co. et al., Case No. 90-2554-CIV-MARCUS (S.D. Fl. June 6, 1991) at 14 (slip opinion). On June 19, 1991 Press submitted a copy of this opinion to the Commission as a Supplement to its Petition for Reconsideration.

It should be noted that, in the context of the tower litigation, it was in Rainbow's interest to demonstrate to the judge that it had obtained financing. After all, Rainbow was trying to convince Judge Marcus that, absent a preliminary injunction, Rainbow would suffer irreparable harm. Thus, Rainbow had both the incentive and the burden of demonstrating that it was in fact ready, willing and able to construct. As the quote
(continued...)

was in fact nothing more than an effort by Rainbow to secure financing which was otherwise unavailable to Rainbow, and without which Rainbow would not be able to construct. Press has repeatedly advanced its theory that Rainbow is not financially qualified. Rainbow has consistently sidestepped, without squarely confronting, Press' claims. ^{13/}

39. In any event, Commission precedent clearly precludes consideration of Rainbow's proposal to "reorganize" itself. As the Commission stated in *High Point Community Television, Inc.*, 2 FCC Rcd 2506, 2507 (1987), a proposed

reorganization of a permittee corporation [so that the original permittee would remain in control] and the infusion of new capital are not bases for grant of an extension application ^{14/}

Thus, Rainbow's reliance on the pendency of its own "reorganization" application is unavailing.

40. "*Rainbow's Proposal*". In an apparent effort to convince the Commission of its continued vitality, Rainbow advances a projected construction schedule which would, according to Rainbow, put the station on the air in approximately eight months. As with the rest of Rainbow's Petition, this approach tends to confirm the wisdom of Ms. Kreisman's action.

41. First, it is woefully late for Rainbow to be considering construction schedules.

^{12/}(...continued)

above demonstrates, and as even a cursory review of Judge Marcus' opinion will confirm, Rainbow failed miserably in precisely this regard.

^{13/} By way of example, when Press advanced its allegations of Rainbow's financial inability in its February, 1991 petition for reconsideration, Rainbow came back with the following oblique response:

Press asserts that if Rainbow is exploring the possibility of equity financing, it must have "lost" its application financing. In short, Press relies solely upon surmise from its own speculation. . . . Nothing precludes Rainbow from availing itself of alternative financing, a common occurrence for new stations.

Rainbow Opposition to Press Petition for Reconsideration (filed March 12, 1991) at 7.

^{14/} In its Petition Rainbow mischaracterizes the facts of the *High Point* decision. In particular, Rainbow fails to mention that the permittee there proposed a "reorganization of the permittee corporation" which would not result in a transfer of control. See 2 FCC Rcd at 2506. That, of course, is what Rainbow claims to have proposed in its assignment application. As noted in the text above, the Commission unequivocally refused to consider such a proposal as a basis for extending a permit.

The time for that was in September, 1990, when Rainbow's grant became final. *That* was when Rainbow should have figured out how long it might take to build the station. A permittee cannot sit back and wait until the end of its permit -- or, in Rainbow's case, until *after* the permit has been cancelled -- before it begins to take reasonable steps toward construction. *E.g., High Point, supra.*

42. Second, Rainbow's new-found determination to put the station on the air in a matter of months raises an obvious question: if Rainbow thinks it can complete construction in eight months *now*, why could it not have completed construction *within eight months of August 30, 1990*? After all, Rainbow has consistently represented itself as being "ready, willing and able" to construct -- why could it not have invoked this eight-month plan at any other time in the past three years?

43. Presumably, Rainbow would respond that it could not implement the plan until its assignment application was granted. But that returns us to a question we asked earlier -- why not? Why couldn't Rainbow construct without a grant of the assignment application? Rainbow's failure to answer that question weighs heavily against Rainbow. ^{15/}

III. In Any Event, Rainbow's Application Cannot Be Granted Before A Full Hearing Into Rainbow's Basic Qualifications.

44. Even if the Commission were inclined to ignore the overwhelming weight of precedent and policy supporting Ms. Kreisman's decision, Rainbow's applications could still not be granted without a full evidentiary hearing into the many serious questions which Rainbow's conduct has plainly raised. When such questions are raised, the Commission has a statutory duty to resolve those questions before grant. *See, e.g., Astroline Communications Company Limited Partnership v.*

^{15/} It should also be noted that Rainbow's ambitious eight-month plan appears to hinge to some degree on an equipment financing agreement, a copy of which is included in Rainbow's Petition. Some observations about that "agreement" are appropriate. First, it is not dated or signed, so it does not appear to constitute an actual agreement. Second, the date indicated in the first paragraph is "July __, 1993". Thus, it is clear that this "agreement" (if agreement it be) was struck well *after* the cancellation of Rainbow's permit. As such, it cannot be given consideration. *See, e.g., High Point, supra.* Third, the "agreement" references certain guarantees and security agreements, copies of which are not provided by Rainbow. That raises further questions about the intent of the parties. Fourth, the "agreement" appears to hinge *ab initio* on the notion that Rainbow is a permittee -- a notion which is no longer valid since the cancellation of Rainbow's permit.

FCC, 857 F.2d 1556 (D.C. Cir. 1988); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991); *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378, 71 R.R.2d 1386 (D.C. Cir. 1993). Here, Rainbow's various representations and machinations raise substantial and material questions about its truthfulness and candor before the Commission, its financial qualifications, and its willingness to abuse the Commission's processes, at a minimum. ^{16/}

45. *Misrepresentation/Lack of Candor.* In two separate applications filed in 1991, Rainbow represented that its "actual construction ha[d] been delayed by a dispute with the tower owner". That was a demonstrably false representation which Rainbow itself knew to be false. There is clear evidence that Rainbow knew in 1990 and 1991 that that statement was false ^{17/}, and in its most recent submissions Rainbow itself appears to be flatly contradicting its own earlier statement. ^{18/}

46. By the same token, Rainbow has repeatedly represented to the Commission that it is "ready, willing and able" to construct. *See, e.g.*, Attachment F hereto (Rainbow's January, 1991 extension application). But now Rainbow is contradicting *that* statement, saying instead that it is -- for some reason which Rainbow is understandably reluctant to disclose -- "unable" to construct. And separate and apart from Rainbow's own conflicting statements, the record of Rainbow's actions, or inactions, confirms Rainbow's apparent inability. After all, Rainbow had its permit for almost three years following the conclusion of all judicial appeals. And yet it did virtually *nothing* to construct its station.

^{16/} Press hastens to emphasize that, even if a hearing were to be designated, the cancellation of Rainbow's permit should be left in effect pending the resolution of the hearing. That is, designation for hearing on Rainbow's basic qualifications should *not* be deemed automatically to breathe the breath of life back into the permit. Rainbow has had more than its fair opportunity to construct its station, and it has failed to avail itself of that opportunity.

^{17/} *See* Footnote 3 and Paragraph 9, *supra*.

^{18/} *See, e.g.*, Rainbow Petition at 6 ("Rainbow's dispute with the tower owner did not materially delay construction.")

47. In a related vein, as noted above, in each of Rainbow's extension applications Rainbow represented that all the statements contained in its original construction permit application remained accurate. In view of Rainbow's apparent lack of financial qualifications (see below), though, those statements appear to be false as well.

48. There are, therefore, extraordinarily clear indications that Rainbow has consistently lied to the Commission. Rainbow, of course, has had repeated opportunities over the last 30 months to address those indications and to explain why they don't constitute misrepresentation. Rainbow has elected not to do so. As a result, substantial and material questions concerning Rainbow's truthfulness and candor exist, and a hearing would be necessary before Rainbow could be granted any authorization at all.

49. *Financial Qualifications.* Press thinks it is painfully obvious, from the facts and circumstances which are a matter of record, that Rainbow is not now financially qualified and has not been financially qualified for some time, probably at least since January, 1991. Notwithstanding Rainbow's repeated assertions that it is "ready, willing and able" to construct, the fact is that Rainbow has *NOT* constructed, and that Rainbow is now telling the Commission that it is *UNABLE* to construct absent some reorganization apparently designed to infuse new cash into Rainbow. It is hard to imagine a clearer admission of financial inability.

50. Further indications of that inability may be detected in the various postures which Rainbow has assumed over the last 30 months. Recall that, in its tower litigation in early 1991, Rainbow acknowledged (in sworn testimony) that it hoped to obtain *\$4 million* in some form of financing from one Mr. Conant.^{19/} But then in its November, 1991 application, Rainbow upped the ante, advising the Commission that it expected to have *\$6 million* at its disposal if its "reorganization" were to occur. See BTTCT-911129KT. And now, in its post-cancellation proposal, Rainbow claims

^{19/} Of course, as noted above, notwithstanding Rainbow's apparent wishful thinking in this regard, Judge Marcus concluded that "there is no convincing proof that Rainbow actually has financial backing". See Footnote 12, *supra*.

to be relying on equipment financing of only **\$2 million** -- and, as discussed above, *see* Footnote 15, the actual availability of that \$2 million is far from clear at this time. ^{20/} The roller-coaster ride of Rainbow's supposed financing raises questions in and of itself.

51. But even more conclusive is the fact that Rainbow had apparently not even selected equipment until *after* its permit was cancelled. How could Rainbow have hoped to make the necessary arrangements for financing if it did not know what it would be acquiring in the way of equipment? ^{21/}

52. Rainbow has had ample opportunity to demonstrate its financial qualifications. It has consistently failed to do so. To the contrary, it has most recently stated quite plainly that it is "unable" to construct absent its proposed "reorganization", and it has previously acknowledged that the sole purpose of that "reorganization" would be to permit the infusion of new capital. The only possible conclusion which one can legitimately draw from this is that Rainbow is not now (and apparently has not been for some time) financially qualified. As a result, Rainbow's application could not in any event be acted on until a hearing were held with respect to the history of Rainbow's financial qualifications.

53. *Abuse of Process.* Rainbow's overall course of conduct in this matter has constituted an abuse of the Commission's processes, a transparent attempt to withhold and dissemble in an effort to keep its construction permit alive. And, while Rainbow was completely inactive as far

^{20/} At page 11 of its Petition, Rainbow also makes passing reference to "some \$2 million" which would supposedly be released if it were permitted to reorganize itself. Rainbow does not explain, however, what happened to the other \$4 million which Rainbow had originally indicated, in its assignment application, would be infused if that reorganization were to occur.

^{21/} And even Rainbow's post-cancellation equipment list, tendered with its Petition, raises questions. A cursory review of that list does not reveal any antenna line/wave guide (or associated hardware) with which to connect the transmitter to the antenna. It reveals no auxiliary generator, no air conditioning (or associated ductwork) for the transmitter site, no studio space. It does not appear to include any provision for installation of *any* of the equipment, including mounting of the antenna and connection of the antenna to the transmitter. Oddly, the equipment which Rainbow *did* list totals more than \$1.5 million, and Rainbow's supposed "equipment loan agreement" would provide only \$2 million. The relative slimness of the cushion and the contrasting extensiveness of obviously omitted items from Rainbow's list raises questions as to the adequacy of the supposed \$2 million.